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Supreme Court, U.S.
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No. 08-506

In the Supreme Court of the United States

Janet Sue Shriner,

Petitioner,

v.

State of Minnesota,

Respondent.

On Petition for Writ of Certiorari
from the Supreme Court of the State of Minnesota

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

Summary

Petitioner was involved in a personal injury accident when she drove her car into oncoming traffic. The police observed indicia of intoxication, placed Petitioner under arrest and transported her to a hospital where a blood sample was drawn without a search warrant. Subsequent analysis of the blood sample revealed a blood alcohol concentration of 0.33.

The trial court suppressed the blood test results, holding that there was not sufficient exigency to justify a warrantless blood draw. The Minnesota Court of Appeals affirmed. The Minnesota Supreme Court reversed. The Supreme Court held that "...when law enforcement has probable cause to believe a defendant has committed the offense of criminal vehicular homicide or operation...it is important that the defendant's blood be tested within 2 hours of the accident causing injury to or the death of another. The rapid, natural dissipation of alcohol in the blood creates single-factor exigent circumstances that will justify the police taking a warrantless, nonconsensual blood draw from a defendant, provided that the police have probable cause to believe that defendant committed criminal vehicular homicide or operation."

Question

Is the nonconsensual, warrantless withdrawal of a blood sample in a criminal vehicular operation case a "single-factor" exigency under *Schmerber v. California* when there exists probable cause to believe the defendant committed the offense of Criminal Vehicular Homicide or Operation?

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OPINIONS, ORDERS BELOW

Respondent agrees with, and adopts by reference, the documents attached to the Petition, Appendix 1-76.

JURISDICTION

Respondent agrees with the jurisdictional statement as contained in the Petition.

Statutory and constitutional provisions involved

A. Amendment Four, United States Constitution: The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

B. Minn. Stat. § 609.21, Criminal Vehicular Homicide and Injury Subdivision 1. Criminal Vehicular Homicide or Operation; crime defined

A person is guilty of criminal vehicular homicide or operation and may be sentence as provided in subdivision 1a, if the person causes injury to or the death of another as a result of operating a motor vehicle:

(1) in a grossly negligent manner;
(2) in a negligent manner while under the influence of:
(i) alcohol;
(ii) a controlled substance; or

(iii) any combination of those elements;

(3) while having an alcohol concentration of 0.08 or more;

(4) while having an alcohol concentration of 0.08 or more, as measured within two hours of the time of driving;

(5) in a negligent manner while knowingly under the influence of a hazardous substance;

(6) in a negligent manner while any amount of a controlled substance listed in schedule I or II, or its metabolite, other than marijuana or Tetrahydrocannabinols, is present in the person's body;

(7) where the driver who causes the accident leaves the scene of the accident in violation of section 169.09, subdivision 1 or 6; or

(8) where the driver had actual knowledge that a peace officer had previously issued a citation or warning that the motor vehicle was defectively maintained, the driver had actual knowledge that remedial action was not taken, the driver had reason to know that the defect created a present danger to others, and the injury or death was caused by the defective maintenance. (emphasis added)

STATEMENT OF FACTS

The Statement of Facts of Janet Sue Shriner ("Petitioner") set forth at page 3 of the Petition for a Writ of Certiorari accurately reflects the facts of this case with the following exceptions. The time between the police being dispatched as a result of the accident caused by Petitioner and the time her blood was drawn at the hospital was 45 minutes, not "approximately 30 minutes". Contrary to Petitioner's statement, Officer Yakovlev did not refer to the

procedure of obtaining a test outside the Implied Consent law as a *"Schmerber* draw" nor did he testify that he had no concern Petitioner might "slip under the legal limit at any moment." Both of those statements were contained in questions posed to the officer on cross-examination by Petitioner's counsel. Officer Yakovlev agreed with the questions posed by defense counsel, but the words in the quotations were those of the attorney, not of the officer.

ARGUMENT

This court should deny Certiorari because: (a) the Minnesota Supreme Court properly interpreted and applied the "exigency" requirement of *Schmerber v. California*[1] governing blood withdrawals in criminal vehicular operation cases; (b) the vast majority of the courts have uniformly construed *Schmerber* in precisely the same way for the past 42 years; and (c) the Minnesota Supreme Court's interpretation of *Schmerber* is preferable to Petitioner's interpretation.

In *Schmerber v. California,* this Court held that the Fourth Amendment permits blood to be taken incident to a lawful arrest, without a warrant and over the arrestee's objection, if three requirements are met: (1) the arresting officers have a "clear indication" that the evidence they seek will be found in the arrestee's blood; (2) exigent circumstances exist; and (3) the method used to take the blood sample is "a reasonable one" and "performed in a reasonable manner". [2]

In the present case, Petitioner does not take

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[1] 384 U.S. 757, 86 S.Ct. 1826; 16 L.Ed.2d 908 (1966).

[2] 384 U.S. 757, 770-71, 86 S.Ct. 1826; 16 L.Ed.2d 908 (1966).

issue with whether or not there is a clear indication that the evidence they seek will be in the arrestee's blood or that the procedures employed to draw the blood were reasonable. Petitioner's only contention is that investigating officers lacked sufficient exigency to negate the need for a search warrant.

Under *Schmerber,* the test for exigent circumstances is an objective one: whether "the officer. . . might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened 'the destruction of evidence.'"[3] In *Shriner,* the Minnesota Supreme Court interpreted *Schmerber* as holding that the rapid, natural dissipation of alcohol in the blood creates single factor exigent circumstances that will justify the police taking a warrantless, nonconsensual blood draw from a defendant, provided that the police have probable cause to believe that defendant committed a criminal vehicular homicide or operation.[4]

Petitioner asserts that the Minnesota Supreme Court misinterpreted *Schmerber* and decided *Shriner* in a manner that was inconsistent with other decisions of this court (Petition p. 7-17) and that this misinterpretation conflicts with the decisions of other states (Petition p. 17-19). The State disagrees.

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[3] *Schmerber,* 384 U.S. at 770; *Preston v. United States,* 376 U.S. 364, 367, 11 L.Ed.2d 77784 S.Ct. 881, 883 (1964).

[4] *State v. Shriner,* 751 N.W.2d 538, 549-50 (Minn. 2008).

I. *Schmerber* is properly understood as holding that the fact of continuous, rapid blood alcohol dissipation alone satisfies the "exigency" requirement for a warrantless blood draw in criminal vehicular operation cases.

The heart of the "exigency" requirement in *Schmerber* is that it is reasonable not to require police to seek out a warrant and risk further delay in securing chemical evidence of intoxication from a lawfully arrested drunk driving suspect beyond the delay that inheres in the process of obtaining the blood sample.[5] This exigency requirement is largely subsumed in a single paragraph of *Schmerber:*

> The officer in the present case, however, might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened "the destruction of evidence,"... We are told that the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system. Particularly in a case such as this, where time had to be taken to bring the accused to a hospital and to investigate the scene of the accident, there was no time to seek out a magistrate and secure a warrant. Given these special facts, we conclude that the attempt to secure evidence of blood-

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[5] Probable cause to arrest may substitute for the predicate fact of a lawful arrest under some interpretations of *Schmerber*. See, 3W *LaFave*, Search and Seizure, Sec. 5.4(b) at 193-201 (4th Edition 2004).

> alcohol content in this case was an appropriate incident to petitioner's arrest.[6] (Internal citation omitted)

It is from this language that later courts have properly interpreted *Schmerber* for the proposition that continuous, rapid blood alcohol dissipation alone satisfies the "exigency" requirement for a warrantless blood draw in criminal vehicular operation cases.[7]

Petitioner reads *Schmerber* as requiring more than the rapid dissipation of alcohol in the blood stream as a basis for meeting the exigency requirement in criminal vehicular operation cases. Petitioner asserts that in *Schmerber* the hospitalization of the accused and the lapse of two hours until arrest, were additional requirements before exigent circumstances exist for a warrantless blood draw. (Petition p. 11)

As the Minnesota Supreme Court concluded, however, Petitioner reads *Schmerber* too narrowly. There is no discussion in *Schmerber* either of the time necessary to secure a warrant or of when police obtained probable cause and could have applied for a warrant. If anything, the record in *Schmerber* suggests that the officer who arrived at the accident scene immediately acquired probable cause upon observing "symptoms of drunkenness" in the accused.[8] Nor did this Court in *Schmerber* examine the nature of blood alcohol evidence short of

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[6] *Schmerber*, 384 U.S. at 770-71.

[7] *Cupp v. Murphy*, 412 U.S. 291, 93 S.Ct. 2000, 36 L.Ed.2d 900 (1973) this court expanded the rationale in the holding of *Schmerber* to also include cases that were pre-arrest, but with probable cause.

[8] *Schmerber*, 384 U.S. at 769.

identifying its evanescence. Accordingly, in *Schmerber,* the facts that an accident occurred and that the accused was taken to the hospital say nothing about the exigency for making the warrantless search at the time it was actually made.[9]

In light of the foregoing considerations, *Schmerber* is best understood - on its facts -- in the manner expressed by the Minnesota Supreme Court:

> "[t]he rapid, natural dissipation of alcohol in the blood creates single-factor exigent circumstances that will justify the police taking a warrantless, nonconsensual blood draw from a defendant, provided that the police have probable cause to believe that defendant committed criminal vehicular homicide or operation."

Petitioner further argues that this Court's analysis in *Welsh v. Wisconsin,*[10] is determinative of its intent regarding the concept of exigent circumstances in the *Schmerber* decision.[11] In *Welsh,* this Court held that, without sufficient exigent circumstances, law enforcement officers may not make a warrantless nighttime entry into the home of an individual to arrest him for a civil, non-jailable traffic offense, i.e. a first time offense of driving while

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[9] For example, there is no explanation why the warrant process could not have been started shortly after the officer acquired probable cause at the accident scene. Nor is there any explanation, in terms of the rate of blood alcohol dissipation, as to why it would have been too late to seek out a warrant two hours after the accident when the accused was arrested at the hospital, or at any other point in time.

[10] 466 U.S. 740; 104 S.Ct. 2091, 80 L.Ed.2d 732 (1984).

[11] Petition at 15.

intoxicated under Wisconsin State law.[12] However, it is important to note that *Welsh* did not dispute the evanescent character of evidence of intoxication. Rather, this Court invalidated the arrest because "an important factor to be considered when determining whether any exigency exists is the gravity of the underlying offense for which the arrest is being made.[13] Instead, this Court in *Welsh* acknowledged "destruction of evidence" as an emergency condition" justifying a warrantless search, under *Schmerber.*

> Prior decisions of this court, however, have emphasized that exceptions to the warrant requirement are "few in number and carefully delineated," (internal citation omitted) and that the police bear a heavy burden when attempting to demonstrate an urgent need that might justify warrantless searches or arrests. Indeed, the court has recognized only a few such emergency conditions, see, e.g., *United States v. Santana,* 427 U.S. 38, 42-43 (1976)(hot pursuit of a fleeing felon); *Warden v. Hayden,* 387 U.S. 294, 298-99 (1967)(same); ***Schmerber v. California,* 384 U.S. 757, 770-71 (1966)(destruction of evidence);** *Michigan v. Tyler,* 436 U.S. 499, 509 (1978)(ongoing fire), and has actually applied only the "hot pursuit" doctrine to arrests in the home, see *Santana,* supra.[14] (emphasis added)

Petitioner in this case was arrested for and charged

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[12] *Id.* at 753-54.

[13] *Id.* at page 753.

[14] *Id.* at 149-50.

with the criminal offense of criminal vehicular operation resulting in bodily harm. Clearly this is a jailable offense and therefore *Welsh* is inapplicable to the analysis of this court's intent in *Schmerber*.

II. The vast majority of the courts, state, and federal, have uniformly construed *Schmerber in* precisely the same way as the Minnesota Supreme Court did in *Shriner* for the past 42 years.

More specific to the issue of this Court's intent in *Schmerber,*[15] is *Cupp v. Murphy*[16] which was decided in 1973. In *Cupp v. Murphy,* this Court expanded the first factor in *Schmerber* to include the existence of probable cause, not just a lawful arrest.[17] Relying on *Chimel v. California,*[18] this Court stated that under the circumstances of *Cupp v. Murphy,* the police were justified in subjecting Murphy to a limited search necessary to preserve the highly evanescent evidence (blood) found under his fingernails, citing *Schmerber v. California.* This Court said, "[o]n the facts of this case considering the existence of probable cause, the very limited intrusion undertaken incident to the station house detention, and the ready destructibility of the evidence, we cannot say that the search violated the Fourth and Fourteenth Amendments."[19] There was no discussion of passage of time beyond the necessity of obtaining the evidence

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[15] *Id.* at page 753.

[16] 412 U.S. 291; 93 S.Ct. 2000, 36 L.Ed.2d 900 (1973).

[17] *Id.* at 296.

[18] 395 U.S. 752; 89 S.Ct. 2034; 23 L.Ed.2d 685 (1969) (recognizing an exception to the warrant requirement when a search is incident to a valid arrest.

[19] *Id.*

before Murphy had the opportunity to destroy it.

In 1983 this Court decided *South Dakota v. Neville,*[20] and reversed the Supreme Court of South Dakota which had affirmed the suppression of Neville's refusal to take a blood test on the grounds that allowing the refusal into evidence at trial violated Neville's federal and state privilege against self incrimination. In *Neville,* this Court also discussed its holding in *Schmerber* that the forced withdrawal of blood under the circumstances did not violate the Fourth Amendment, noting "Schmerber also rejected arguments that the coerced blood test violated the right to due process, the right to counsel, and the prohibition against unreasonable searches and seizures."[21] This Court went on to state *"Schmerber,* then, clearly allows the state to force a person suspected of driving while intoxicated to submit to a blood alcohol test."[22]

In 1985 *Winston v. Lee*[23] was decided. In *Winston,* this Court applied the *Schmerber* balancing test to the state's request for compelled surgical intrusion into a suspect's body for evidence. In that situation, citing *Schmerber,* this Court concluded that the procedure sought was an example of the "more substantial intrusion" cautioned against in *Schmerber.* In *Winston,* this Court discussed the reasonableness prong of the *Schmerber* balancing test and differentiated between blood tests and the proposed surgical intrusion. This Court stated, *"Schmerber* recognized society's judgment that blood

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[20] 459 U.S. 553; 103 S.Ct. 916; 74 L.Ed.2d 748 (1983).

[21] *Schmerber,* footnote 8, at 559.

[22] *Neville* at 756.

[23] 470 U.S. 753; 105 S.Ct. 1611; 84 L.Ed.2d 662 (1985).

tests do not constitute an unduly extensive imposition on an individual's personal privacy and bodily integrity."[24] In discussing the balancing of the community's interest against an individual's interest, this Court further stated:

> "Weighed against these individual interests is the community's interest in fairly and accurately determining guilt or innocence. This interest is of course of great importance. We noted in *Schmerber* that a blood test is "a highly effective means of determining the degree to which a person is under the influence of alcohol." . . . Moreover, there was "a clear indication that in fact [desired] evidence [would] be found" if the blood test were undertaken.... Especially given the difficulty of proving drunkenness by any other means, these considerations showed that results of the blood test were of vital importance if the state were to enforce its drunken driving laws. In *Schmerber,* we concluded that this state interest was sufficient to justify the intrusion, and the compelled blood test was "reasonable" for Fourth Amendment purposes.[25] (Internal citations omitted)

Skinner v. Railway Labor Exec. Assoc.[26] was decided in 1989. In *Skinner,* the Court upheld against a Fourth Amendment attack a federal railroad administration regulation that in relevant part required toxicological testing of the blood of all

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[24] *Winston* at 762.

[25] *Id.* at 762-63.

[26] 489 U.S. 602; 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989).

railroad employees in certain train accidents. As part of its rational for concluding that such blood samples may be taken without warrants, the court cited *Schmerber* for the propositions that blood samples "must be obtained as soon as possible" and that "the delay necessary to procure a warrant nevertheless may result in the destruction of valuable evidence."[27]

Although the blood testing of railroad employees discussed in *Skinner* is not aimed at procuring evidence for criminal prosecutions, the bodily intrusion at stake — the privacy interest — is no different than in the drunk driving context. Indeed, the public safety interest at stake is virtually identical in both the railroad situation addressed in *Skinner* and the context of drunk driving: to remove the intoxicated operators from the stream of transportation. In short, if the "exigency" requirement of *Schmerber* is unclear, *Skinner* goes far in clarifying it: exigency based solely on the fact of continuous, rapid blood alcohol dissipation.

Finally, in *Illinois v. McArthur*[28], decided in 2001, this Court discussed exceptions to the warrant requirement. McArthur had been restrained outside of his house while officers went to obtain a warrant to search for drugs inside his home. In *McArthur,* the Court found that a warrantless seizure of the suspect was not *per se* unreasonable since it involved exigent circumstances and the restraint issued was tailored, avoiding significant intrusion into McArthur's home.

> "We nonetheless have made it clear that there are exceptions to the warrant

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[27] *Skinner, Id.* at 623.

[28] 531 U.S. 326; 121 S.Ct. 946; 148 L.Ed.2d 838 (2001).

> requirement. When faced with special law enforcement needs, diminished expectations of privacy, minimal intrusions, or the like, the court has found the certain general, or individual, circumstances may render a warrantless search or seizure reasonable. . . In the circumstances of the case before us, we cannot say that the warrantless seizure was *per se* unreasonable. It involves a plausible claim of specially pressing or urgent law enforcement need, i.e., "exigent circumstances." CF., e.g., *United States v. Place,* 462 U.S. 696, 701 ("the exigencies of the circumstances may permit temporary seizure without warrant"); *Warden, MD. Penitentiary v. Hayden,* 387 U.S. 294, 298-99, 18 L.Ed.2d 782, 87 S.Ct. 1642 (1967)(warrantless search for suspect and weapons reasonable where delay posed grave danger); ***Schmerber v. California,* 384 U.S. 757, 770-71, 16 L.Ed.2d 908, 86 S.Ct. 1826 (1966)(warrantless blood test for alcohol reasonable where delay would have led to loss of evidence).**[29] (emphasis added)

Citing *Schmerber,* Justice Souter in his concurring opinion in *McArthur* stated that the "probability of destruction in anticipation of a warrant exemplifies the kind of present risk that undergirds the accepted exigent circumstances exception to the general warrant requirement."[30]

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[29] *McArthur,* 531 U.S. at 330-31.

[30] *McArthur,* 531 U.S. at 337.

IV. Many other courts have implicitly or explicitly held that the dissipation of alcohol always creates sufficient exigency to dispense with the warrant requirement.

Petitioner argues that more states have held that evanescent nature of alcohol does not create an exigency than states which that have held it does.[31] However, Petitioner neglects to list many jurisdictions that agree with Minnesota and misstates the holding of the Supreme Court of Alaska in *State v. Blank*.[32] *Blank* involved a vehicular homicide case where a preliminary breath test result was admitted at trial. The Alaska Supreme Court discussed the three *Schmerber* requirements of probable cause, exigent circumstances, and reasonable procedures.[33] The Supreme Court remanded to the trial court to determine whether exigent circumstances justified the trooper requesting the breath test, as that issue had not previously been reached. The Alaska Supreme Court did not rule that the evanescent nature of the alcohol was not a single factor exigent circumstance. On remand, the trial court did determine that exigent circumstances were present, but that issue was not subsequently appealed.[34]

Other courts that have held in a similar manner as Minnesota include the following: *United States v. Reid,* 929 F.2d 990, 993 (4th Cir. 1991)(categorically rejecting defendant's argument

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[31] Petition page 18.

[32] 90 P.3d 156 (AL 2004).

[33] *Id.* at 161.

[34] *State v. Blank,* 142 P.3d 1210 (AL Ct. App. 2006).

that the state could have obtained a warrant prior to breath test because "compliance with [federal telephonic warrant] rules takes time. Time is what it lacking in these circumstances."); *Ry. Labor Executives' Ass'n v. Burnley,* 839 F.2d 575, 583 (9th Cir. 1988)("We can agree that the exigencies of testing for the presence of alcohol and drugs in blood, urine or breath require prompt action which precludes obtaining a warrant.") (citations omitted), rev'd on other grounds, *People v. Shepherd,* 906 P.2d 607, 610 (Colo. 1995)(presuming exigency and allowing warrantless search "because alcohol dissipates quickly in the blood"); *State v. Ravotto,* 169 N.J. 227, 777 A.2d 301, 315 (N.J. 1991)(finding that "consistent with *Schmerber* and our analogous case law, the dissipating nature of the alcohol content in defendant's blood presented an exigency that required prompt action by the police. Under those conditions, a warrantless search was justified."); *State v. Bohling,* 173 Wis. 2d 529, 494 N.W.2d 399, 400 (Wis. 1993); *cert. denied,* 510 U.S. 836, 114 S.Ct. 112; 126 L.Ed.2d 78 (1993)("The dissipation of alcohol from a person's blood stream constitutes a sufficient exigency to justify a warrantless blood draw."); *State v. Cocio,* 147 Ariz. 277, 709 P.2d 1336, 1345 (Ariz. 1985)(evanescent nature of alcohol in defendant's blood stream is exigent circumstance since alcohol in a suspect's blood is certain to disappear); *People v. Ritchie,* 130 Cal. App. 3d 455, 458, 181 Cal. Rptr. 773 (Cal. App. 1982)("In intoxication by alcohol, the special factor that the percentage of alcohol in the blood begins to diminish shortly after its consumption triggers the warrantless intrusion into the body."); *State v. Taylor,* 12 Conn. App. 427, 531 A.2d 157, 160-61 (Conn. App. 1987)(exigent circumstances consisting of dissipation of blood alcohol content

justified breathalyzer tests); *State v. Entrekin,* 98 Haw. 221, 47 P.3d 336, 348 (Haw. 2002)(exigent circumstances clearly present because alcohol dissipates from bloodstream); *State v. Woolery,* 116 Idaho 368, 775 P.2d 1210, 1212 (Idaho 1989)("The destruction of the evidence by metabolism in the blood provides an inherent exigency which justifies the warrantless search."); *DeVaney v. State,* 288 N.E.2d 732, 735, 259 Ind. 483 (Ind. 1972)(exigent circumstances present since the evidence of blood alcohol content "might soon disappear during the time necessary to obtain the warrant"); *State v. Baker,* 502 A.2d 489, 493 (Me. 1985)("The bodily process that eliminates alcohol also provides exigent circumstances obviating the need for a warrant prior to administering a blood test."); *State v. Lerette,* 858 S.W.2d 816, 819 (Mo. 1993)(exigent circumstances exist because "the percentage of alcohol in the bloodstream diminishes with time" and "the delay caused by having to obtain a warrant might result in the destruction of evidence"); *Commonwealth v. Anderl,* 329 Pa. Super. 69, 477 A.2d 1356, 1364 (Pa. Super. 1984)("The warrantless seizure of the appellant's alcohol-laden breath is valid either as a search incident to arrest or a search necessitated by exigent circumstances; i.e., the evanescent nature of the alcohol in appellee's [sic] bloodstream."); *State v. Humphreys,* 70 S.W.2d 752, 760-61 (Tenn. Crim. App. 2001)("Based upon the fact that evidence of blood alcohol content begins to diminish shortly after drinking stops, a compulsory breath or blood test, taken with or without the consent of the donor, falls within the exigent circumstances exception to the warrant requirement."); *Aliff v. State,* 627 S.W.2d 166, 170 (Tex. Crim. App. 1982)(because "alcohol in blood is quickly consumed and the evidence would be

lost forever," the warrantless taking of blood does not violate the Fourth Amendment); *Tipton v. Commonwealth*, 18 Va.App. 370, 444 S.E.2d 1, 3, 10 Va. Law Rep. 1352 (Va. App. 1994)("Exigent circumstances existed due to the dissipating nature of alcohol in the blood."); *Bennett v. Coffman*, 178 W. Va. 500, 361 S.E.2d 465, 469 (W. Va. 1987) overruled on other grounds by *State v. Chase Securities, Inc.*, 188 W. Va. 356, 424 S.E.2d 591 (W. Va. 1992) (Warrantless administration of blood-alcohol test did not violate plaintiffs constitutional rights based on "destruction of evidence" exception to the warrant requirement).

Petitioner suggests that the availability of telephonic warrants under the Minnesota Rules of Criminal Procedure[35] has altered the analysis of exigency set forth in *Schmerber* and continues to argue that it is a simple, very timely, procedure. However, the Minnesota Supreme Court considered that argument and rejected it.[36] Minnesota's Rules of Criminal Procedure which allow for telephonic warrants are very similar to that under the Federal Rules of Criminal Procedure.[37] Both require procedures which are quite time consuming.

At least one federal court has expressly addressed the issue of a warrantless blood draw for evidence of alcohol intoxication and rejected the argument that a telephonic search warrant could have been obtained. In *United States v. Reid*,[38] the defendants were separately convicted of drunk

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[35] Minn.R.Crim.P. 36 (2006).

[36] *Shriner*, 751 N.W.2d at 549.

[37] Fed.Crim.P. 41(d)(3)(A) and 41(e)(3)(2006).

[38] 929 P.2d 990, 991-92 (4th Cir. 1991).

driving offenses under 36 CFR § 4.23 that did not involve accidents or injuries. In each case, breathalyzer testing followed within an hour after the arrest.[39] The defendants challenged the admission of the test results under the Fourth Amendment, arguing that police should have sought telephonic warrants under Federal Rule of Criminal Procedure 41(c)(2).[40] In rejecting this argument the federal court explained that the availability of telephonic warrants "does not alter the exigency of the situation:"

> Rule 41(c)(2)(B) requires that the police prepare a document known as "a duplicate original warrant" before calling the magistrate judge. Rule 41(c)(2)(B) also requires that the police must read the document verbatim to the magistrate judge. The magistrate judge must enter verbatim what is read to him onto a document known as the original warrant. Rule 41(c)(2)(D) requires the magistrate judge to place under oath the police officer requesting the warrant and anyone whose testimony forms a basis of the application. Further, Rule 41(c)(2)(D) requires the magistrate judge to record the conversation if a voice recording device is available; otherwise, the magistrate judge must arrange for a stenographic or long-

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[39] *Id.*

[40] The version of the Federal Rules of Criminal Procedure in effect in 1991. Further, although there is a recognized difference between a breath test and a blood draw, this difference is not relevant to the federal court's rationale concerning the availability of telephonic warrants and the analysis of exigent circumstances.

> hand verbatim record to be made. Obviously compliance with these rules takes time.[41]

The federal court in *Reid* concluded that "time is of the essence when testing for alcohol in the blood stream."[42] The Minnesota Supreme Court in *Shriner* agreed.

III. The Minnesota Supreme Court's interpretation of *Schmerber* is preferable to Petitioner's interpretation.

Under Minn. Stat. § 609.21, subd. 1(4) the evidentiary value of chemical evidence of intoxication depends on both the timing of the sample and the actual test result.[43]

Asking whether, in a particular case, a police officer might be able to obtain a search warrant for a blood sample without extended delay misses the mark. In light of the interests at stake, officers should not have to speculate about whether too much time has elapsed between the alleged drunken driving and the acquisition of probable cause to obviate the need for a warrant, or about whether a warrant may be obtained quickly enough to preserve the value of the chemical evidence being sought. Requiring law enforcement to consider factors other than probable cause, and reasonableness of testing procedures in criminal vehicular homicide and operation cases

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[41] *Reid*, 929 F.2d at 993 (emphasis in original).

[42] *Reid*, 929 F.2d at 993.

[43] If an individual has an alcohol concentration of 0.08 or more, as measured within two hours of the time of driving, the test result is admissible without expert testimony.

places an unreasonable burden on them. An officer may be familiar with the area in which the accident occurred, but an officer has no control over how long it would take to travel to a judge or the judge's availability. An officer may also not know the time of a suspect's last drink, the amount of alcohol he consumed, or the rate at which the suspect will metabolize alcohol. Finally, an officer cannot know how long it will take to obtain a blood sample once the suspect is brought to the hospital. An officer would then be called upon to speculate on each of these considerations and predict how long the most probative evidence of the defendant's blood alcohol level would continue to exist before a blood sample was no longer reliable.

To construe the "exigency" rule of *Schmerber* as based solely on the fact of blood alcohol dissipation is analogous to construing the "automobile exception" to the warrant requirement as based upon the "exigency" created by the fact that a motor vehicle is mobile.[44] It is a rule of "exigency" which can be easily understood and readily applied by well intentioned and reasonably competent police officers. The dissipation of alcohol from the blood stream is a constant that starts as soon as an individual stops drinking. None of the other factors involved in a "totality of the circumstances" analysis, argued for by Petitioner, affects the fact that alcohol is being metabolized by a suspect's body each and every minute post-accident. It is a single factor exigency. *Schmerber* has been the law for 42 years, and with only a couple exceptions, every court that has addressed the question has construed the "exigency"

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[44] See, *California v. Carney*, 471 U.S. 386, 392-93; 85 L.Ed.2d 406; 105 S.Ct. 2066, 2068 (1985).

requirement of *Schmerber* in the same manner as the Minnesota Supreme Court. Petitioner provides no persuasive reason to re-visit this interpretation in her case.

CONCLUSION

For the reasons stated, Respondent respectfully asks this Court to deny the Petition for a Writ of Certiorari.

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Respectfully submitted,

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